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ABSTRACT

This pamphlet was prepared by the Association of American Publishers (AAP) and the Authors League to: (1) state their understanding of fair use and library photocopying under Section 107; (2) state their understanding of the library copying privileges granted by Section 108, and the limits it imposes on photocopying by nonprofit libraries; (3) present interim guidelines to assist library personnel in determining when a library's production or distribution of photocopies for its own patrons does or does not require copyright permission; and (4) answer questions on library photocopying frequently asked by librarians, educators, and others. The appendices include guidelines for classroom copying in not-for-profit educational institutions with respect to books and periodicals; an excerpt from the Senate Committee's report on systematic copying; a reprint of sections 107 and 108 of the new copyright law; means available to obtain photocopying licenses or authorized copies of copyrighted materials; and discussion of how to obtain permissions. (Author/JPF)

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Photocopying by ACADEMIC, PUBLIC And NONPROFIT RESEARCH LIBRARIES

A statement on library photocopying of journal articles and other short works under the new copyright law, interim guidances, and answers to questions frequently asked.

Prepared by the
Association of American Publishers, Inc.
and by the
Authors League of America, Inc.

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INTRODUCTION

To our colleagues in the library community:

We have prepared this pamphlet on photocopying by nonprofit libraries under the new Copyright Act:

- to state our understanding of fair use and library photocopying under Section 107;
- to state our understanding of the library copying privileges granted by Section 108, and the limits it imposes on photocopying by nonprofit libraries;
- to present interim guidelines to assist library personnel in determining when a library's production or distribution of photocopies for its own patrons *does not* require copyright permission and when it *does* require copyright permission;
- to answer questions on library photocopying frequently asked by librarians, educators and others.

The Senate Judiciary Committee stated that, with respect to library photocopying, Section 108 provides an appropriate statutory balancing of author/publisher rights and the needs of libraries and patrons. Library photocopying that does not require copyright permission should not be inhibited, but when library photocopying does require copyright permission, that should be obtained or copies should be secured from the publisher or a licensed reprographic service. We, the Association of American Publishers and the Authors League, are distributing this booklet to the library community because we believe that librarians, publishers and authors have a common interest in insuring that this balance functions equitably and effectively.

Achieving this goal requires clear understanding of what Sections 107 and 108 provide. It requires specific answers to concrete questions asked by librarians, educators and others. Moreover, the balancing can only function if library employees have explicit practical guidance in applying Section 108 to a library's production or distribution of copies in given transactions. To date, this practical guidance has not been provided for the preponderance of library photocopying.

We hope this booklet will make a constructive contribution toward meeting this need and achieving equitable and effective balancing of author/publisher rights and library/patron needs. In reading what follows, please bear in mind two important points:

First, library photocopying that is prohibited under the new law is only prohibited *without permission or payment*. When there is a need for copies that exceed the statutory limits, they can be made or obtained through a variety of authorized means and sources.

Second, most of the guidances and problems we discuss are of small concern to the vast majority of public libraries that do not themselves make copies for their patrons, and only provide unsupervised copying machines displaying an appropriate copyright warning. Our primary aim, accordingly, is to provide practical assistance to academic libraries, research libraries and large public libraries whose personnel make copies for patrons from their own collections or distribute to patrons copies produced by other libraries. However, we hope the booklet will be helpful to all in understanding our views of both the letter and spirit of the new law.

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I
An Outline of This Booklet

The Statutory Balance

In summary, this is the "statutory balancing" of author/publisher rights and library/patron needs provided by the Copyright Act:

- Under prescribed conditions, the law provides that libraries can make, or obtain from other libraries, photocopies of certain copyrighted materials for their patrons without "copyright permission," i.e., without authorization of the copyright proprietor. Also, certain photocopying for a library's own use is permitted without "copyright permission."
- However, Section 108 imposes limits on library photocopying. When a library's reproduction or ordering of photocopies exceeds these limits, copyright permission must be obtained, and payment made if the proprietor requires it.

The Need For Practical Guidance

A clear understanding of Sections 107 (which deals with fair use) and 108 (which deals with library photocopying) will be useful to library personnel, and we discuss our views on these provisions. But library personnel cannot be expected to interpret the two sections (and their legislative history) each time they are asked to reproduce, order or distribute a photocopy. It is in the common interest of libraries, authors and publishers that library personnel have specific, practical criteria to assist them in determining which photocopying transactions do, and do not, require copyright permission.

The Congressional Recommendation for Guidelines

Congress recognized that neither the Act nor its legislative history could specify precisely whether each instance of library photocopying did, or did not, require copyright permission. Therefore, it recommended that authors, publishers and librarians work together to provide the required practical guidance by meeting "to formulate copying guidelines to assist library employees and patrons."

Despite that recommendation, guidelines have not yet been developed for applying Section 108's limits on in-house photocopying, interlibrary photocopying of journal articles and contributions more than five years old, and other categories of library photocopying, although the AAP and Authors League have urged the library associations to work with us in developing them. Thus far, guidelines have been drawn for only one type of library photocopying—i.e., interlibrary reproduction of journal articles and contributions not more than five years old. In addition, there are guidelines for "classroom photocopying" of literary and musical works, negotiated by publishers', educators' and authors' organizations.

One of the major purposes of this pamphlet is to furnish interim guidelines to fill temporarily the remaining need for practical guidance on those types of library photocopying that account for the bulk of the volume (according to the King Report*). Another purpose is to respond to arguments made by the library associations to justify their refusal to join with us in developing the needed guidelines.

Questions and Answers

Many questions have been asked of us by librarians, educators and others concerning various library photocopying practices and situations. Our answers to these questions also may provide practical assistance to library employees in determining whether particular library photocopying transactions do or do not require copyright permission. These questions and answers begin on page 15 of this booklet.

Other Information to Facilitate Library Photocopying

When photocopying permission is required under Section 108, it can be provided in various ways, including by means of the automatic clearance and payment mechanisms of licensing organizations such as the Copyright Clearance Center.

Authorized copies can also be obtained by libraries from a number of governmental and private reprographic services licensed by copyright proprietors. A list of some of these sources is printed in Appendix D at page 39.

Revision of This Booklet

We invite comment and criticism of this booklet from members of the library community. If changes are required, they will be incorporated in a revised edition.

**Library Photocopying in the United States* prepared for the National Commission on Libraries and Information Science and available from the Superintendent of Documents #052-003-00443-7.

II

Sections 107 And 108: How Does The Law Deal With Library Photocopying?

We turn now to a discussion of Section 107, which deals with fair use, and Section 108, which gives libraries and archives additional photocopying and other reproduction rights, subject to stated limitations.

Section 107—Fair Use

Section 107 writes into the Copyright Act the four traditional factors of fair use.

Library associations have asserted that almost all library photocopying done today is permitted under Section 107; some even have contended that library photocopying that is prohibited under Section 108 is nonetheless authorized by Section 107 as "fair use." These contentions are wrong for the reasons discussed below.

Limited Nature of Fair Use

Under the fair use doctrine, some uses of a copyrighted work may be made without the copyright owner's permission. Four factors determine whether a given instance of library photocopying is or is not fair use:

- The purpose and nature of the use;
- The nature of the copyrighted work;
- The amount and substantiality of the portion used in relation to the work as a whole;
- The effect of the use upon the potential market for or value of the copyrighted work.

The examples of fair use cited in the Report of the Register of Copyrights and repeated in the House and Senate Reports illustrate the limited nature of the uses permitted under Section 107. They are:

> the "quotation of excerpts in a review or criticism for purposes of illustration or comment; quotation of short passages in a scholarly or technical work, for illustration or clarification of the author's observations; use in a parody of some of the content of the work parodied; summary of an address or article, with brief quotations, in a news report; reproduction by a library of a portion of a work to replace part of a damaged copy; reproduction by a teacher or student of a small part of a work to illustrate a lesson; reproduction of a work in legislative or judicial proceedings or reports; incidental and fortuitous reproduction, in a newsreel or broadcast, of a work located in the scene of an event being reported."

The *Williams and Wilkins* Case

Some library spokesmen have claimed that the *Williams and Wilkins* case permits systematic copying of journal articles from a library's collection and other photocopying as "fair uses" under the new Act. The *Williams and Wilkins* decision does not sanction such copying as "fair use." Decided before the new copyright law was enacted, the *Williams and Wilkins* opinion was, by its own characterization, a "holding operation" intended to deal only with that particular case of medical article photocopying – until Congress adopted the new law.

The Senate Judiciary Committee, in addressing the problem, said it is not clear "how far a library may go under the Copyright Act of 1909 in supplying a photocopy of copyrighted material" and that the *Williams and Wilkins* decision "failed to significantly illuminate the application of the fair use doctrine to library photocopying practices."

Moreover, as Barbara Ringer, Register of Copyrights, stated to the House Committee, the 4-4 split decision of the Supreme Court in the *Williams and Wilkins* case effectively deprived the Court of Claims decision of any precedential weight, "wiping out any authority the Court of Claims majority opinion might otherwise have carried."

Section 108, Not Section 107, Provides the Balanced Resolution of the Photocopying Issue.

In dealing with the *Williams and Wilkins* case as it did, the Supreme Court, according to Ms. Ringer, "thus left the issue [of library photocopying] squarely up to Congress to settle."

The Congress did settle the issue by adoption of Section 108. The Senate Judiciary Committee, which wrote the major provisions of Section 108, emphasized that this section provides "an appropriate [statutory] balancing of the rights of creators and the needs of users." Library spokesmen contend that the report no longer has weight because the House "changed" Section 108. Their claim is erroneous as we demonstrate at page 8 and in Appendix B at page 33.

Library spokesmen also contend that Section 108 does not limit the scope of library photocopying permitted by Section 107 because Section 108(f)(4) states that nothing in the latter section "affects the right of fair use as provided by Section 107." But both the House and Senate Committee Reports make clear that Congress did not consider that the kinds of photocopying now permitted by Section 108 were previously permissible as "fair use." Both reports state that "no provision of Section 108 is intended to take away any rights existing under the fair use doctrine." They then add: "*To the contrary, Section 108 authorizes certain photocopying practices which may not qualify as a fair use.*" [emphasis ours].

Section 108 – Library Photocopying

Section 108 authorizes certain kinds of library photocopying that could not qualify as "fair use."

Types of Library Photocopying

Two subsections deal with a library's reproduction of a copy for its own use:

- *Preservation of an Unpublished Work* – a facsimile duplication of an unpublished work may be made for preservation, security or deposit for research use in another library (Section 108(b)).
- *Replacement of Lost (etc.) Copy* – a facsimile duplication of a published work may be made to replace a lost, damaged, deteriorated or stolen copy in the library's collection. The library may only make the copy if it determines, after a reasonable effort, that an unused replacement cannot be obtained at a fair price (Section 108(c)).

Two other subsections permit a library to provide a single photocopy of certain works to a patron or other user. The library may make the copy from its own collection – i.e., "in-house" photocopying. Or it may provide a copy reproduced by another library – i.e., "interlibrary" photocopying. These provisions apply to:

- *Periodical Articles and Other Contributions* – in-house or interlibrary reproduction of a single copy of an article or other contribution to a periodical or other collective work, or a small part of any other copyrighted work, regardless of whether or not it is out of print (Section 108(d)).
- *Out-of-Print Works* – in-house or interlibrary reproduction of a single copy of an entire work or substantial part of it. The copy may be made only if the library has determined by reasonable investigation that a copy cannot be obtained at a fair price (Section 108(e)).

Limitations on Library Photocopying

There are several conditions and limitations on the reproduction and distribution of photocopies to library patrons and other users:

1. *General Conditions*
   - Only a single copy may be reproduced or distributed.
   - This must be done without purpose of commercial advantage.
   - The library's collections must be open to the public or available to nonaffiliated, as well as affiliated, researchers in a specialized field.
   - The reproduction and distribution must include a copyright notice.

These conditions also apply to facsimile duplication for preservation or replacement.

2. *Limitations on the Use of the Copy*
   - The photocopy must become the user's property.
   - The library must have no notice that the copy will be used for purposes other than private study, scholarship or research.

3. *Photocopying Must Be "Isolated and Unrelated"*
   - While a library may reproduce and distribute a single copy of the same material to more than one user, such reproduction of single copies must be "isolated and unrelated" (Section 108 (g)). This limitation also applies to facsimile duplication for preservation or replacement.

4. *Multiple Copying Is Prohibited*
   - The library may not engage in related or concerted reproduction of multiple copies of the same material—i.e., made on one occasion or over a period of time, and whether intended for aggregate use by one or more individuals or for separate use by individual members of a group. The prohibition applies when the library is aware or has substantial reason to believe it is engaging in such reproduction (Section 108(g)(2)). This limitation also applies to facsimile duplication for preservation or replacement.

The Senate Report gives the following as an example of prohibited multiple copying for groups of users:

". . . if a college professor instructs his class to read an article from a copyrighted journal, the school library would not be permitted, under subsection (g), to reproduce copies of the article for members of the class."

5. *Prohibition Of Systematic In-House or Interlibrary Photocopying Of Periodical Articles and Contributions*
   - A library may not "systematically" reproduce or distribute single or multiple copies of periodical articles, contributions, or small parts of other copyrighted works. This prohibition applies to *in-house* library photocopying and to *interlibrary* photocopying, and also limits the photocopying of different articles from the same journal.
   - Arrangements for *interlibrary* photocopying will be considered systematic if they have, as their purpose or effect, that the library receiving such copies for distribution does so in such aggregate quantities as to substitute for a subscription to or purchase of such work.

As to systematic *in-house* library photocopying, of the library's own materials, the Senate Report says:

> "Systematic reproduction or distribution occurs when a library makes copies of such materials available to other libraries or to groups of users under formal or informal arrangements whose purpose or effect is to have the reproducing library serve as their source of such material. Such systematic reproduction and distribution, as distinguished from isolated and unrelated reproduction or distribution, may substitute the copies reproduced by the source library for subscriptions or reprints or other copies which the receiving libraries or users might otherwise have purchased for themselves, from the publisher or the licensed reproducing agencies."

Clearly, there is a numerical limit beyond which copying has this prohibited effect.

The Disagreement Over Section 108

Much of the disagreement over the meaning of Section 108 involves the limitations imposed by that section on systematic library photocopying of journal articles and other contributions. Section 108(g) limits all of the library photocopying rights granted under Section 108 to the "isolated and unrelated" reproduction of a single copy of the same material on separate occasions. Moreover, Section 108 *(g)(1)* states that these library photocopying rights do not extend to the making of "multiple" copies. Finally, Section 108 *(g)(2)* states that these library photocopying rights do not extend to "the systematic reproduction" of single or multiple copies of journal articles and other material described in subsection (d).

"Systematic copying" is therefore forbidden. The CONTU Guidelines*, by stating numerical limits, draw the line between permitted and systematic photocopying for *interlibrary* arrangements of journal articles not more than five years old. The Interim Guidelines that we propose herein, by also stating numerical limits, provide a practical criterion for determining whether *in-house* library photocopying in given transactions is "systematic" or is not "systematic."

As the Senate Report emphasizes, the statutory purpose of Section 108(g)(2) is to prohibit the photocopy from being substituted for a subscription, reprint or other copy that the user or the receiving library might otherwise have purchased for itself.

Following is an example of prohibited systematic *in-house* reproduction cited in the Senate Report:

> "A research center employing a number of scientists and technicians subscribes to one or two copies of needed periodicals. By reproducing photocopies of articles the center is able to make the material in these periodicals available to its staff in the same manner which otherwise would have required multiple subscriptions."

*Guidelines agreed to under the aegis of the National Commission on New Technological Uses of Copyrighted Works (CONTU).

The Senate Report also gives these further examples to illustrate other types of systematic photocopying prohibited by subsection (g):

"A library with a collection of journals in biology informs other libraries with similar collections that it will maintain and build its own collection and will make copies of articles from these journals available to them and their patrons on request. Accordingly, the other libraries discontinue or refrain from purchasing subscriptions to these journals and fulfill their patrons' requests for articles by obtaining photocopies from the source library."

"Several branches of a library system agree that one branch will subscribe to particular journals in lieu of each branch purchasing its own subscriptions, and the one subscribing branch will reproduce copies of articles from the publication for users of the other branches."

The Senate Report Is The Definitive Interpretation of Section 108

Library spokesmen have argued that the Senate Report no longer has weight because the House Judiciary Committee added the "interlibrary arrangements" proviso to Section 108. This argument is specious. In the House bill as originally passed, Section 108 restricted a library to the reproduction of a facsimile copy for purposes of preservation, security or deposit for a research use.

The Senate Judiciary Committee wrote all of the other provisions of Section 108, including Section 108(d), governing photocopying of journal articles; Section 108(e), governing photocopying of out-of-print works; and Section 108(g), imposing the limitations on "isolated and unrelated" reproduction, the prohibition of multiple copying, and the prohibition of systematic reproduction or distribution of journal articles, contributions, etc.

The House of Representatives adopted all of these provisions without change. The House did add the "interlibrary arrangements" proviso to Section 108(g)(2), but this merely clarifies in slightly different language the commentary of the Senate Report on that same subject. The House did not change Section 108(g)(2) as it applied to systematic *in-house* photocopying, nor did it change any of the other provisions of Section 108 as written by the Senate Judiciary Committee. Therefore, the Report of the Senate Committee, the author of Section 108, will receive full weight from the courts in interpreting those provisions.

III
The Guidelines Controversy

Existing Guidelines

The only category of library photocopying for which agreed guidelines have been formulated thus far is interlibrary photocopying of journal articles and other contributions not more than five years old. These were developed under the auspices of CONTU, are incorporated in the House/Senate Conference Committee Report, and are reprinted in Appendix A at page 28.

However, there are also guidelines that will assist librarians in determining when multiple photocopying for classroom educational use (and single copying for teacher preparation) may be done by libraries. These guidelines are incorporated in the House Committee Report and are reprinted in Appendix A at page 25. They were negotiated voluntarily by the AAP, the Authors League and a number of leading educational organizations (NEA, NCTE, ACE, etc.) functioning as an "ad hoc educational committee."*

The Missing Guidelines

Up to this time there have been no guidelines for the practical application of Section 108 to the kinds of copying that account for most of the copying libraries are asked to do, namely:

- Copies made, for patrons, of material in the library's own collection;
- Copies obtained, for patrons, from other libraries of material more than five years old.

This situation has prevailed despite the strong and clear urging of the Congress that such guidelines be negotiated.

The Congressional Recommendation for Guidelines

The Senate Committee Report says:

> "Neither a statute nor legislative history can specify precisely which library photocopying practices constitute the making of 'single copies' as distinguished from 'systematic reproduction'. . . . The committee therefore recommends that representatives of authors, book and periodical publishers and other owners of copyrighted material meet with the library community to formulate photocopying guidelines to assist library patrons and employees."

To hold that this congressional request and the logic supporting it somehow do not apply to the kind of copying libraries are most frequently asked to do is beyond our understanding, but this is the position the library associations have taken. This is why there are no

*Music educators and publishers also negotiated guidelines for the photocopying of musical works.

guidelines for in-house copying in the legislative history, despite the example of the successful negotiation of the classroom teaching guidelines, which showed that a conscientious effort could produce a consensus; it is also why no such guidelines have been developed since the law was passed.

The Library Arguments on Guidelines

The library associations have not only refused to negotiate; they have hurled various charges at AAP and the Authors League for even having proposed that guidelines be negotiated.

Most of these charges are of recent inspiration, whereas our recommendation for guidelines is not. We sought negotiations before the law was passed; we recommended to CONTU in January 1977 (and subsequently) that the parties develop guidelines for systematic in-house reproduction and other forms of photocopying; we informed CONTU, in response to its later request, that we would be willing to work with it and the library associations to establish such guidelines. The library associations declined in each instance.

The library associations now claim we are trying to change the law. This is not the case. The formulation of voluntary guidelines does not change the Copyright Act. The CONTU Guidelines did not change the proviso to Section 108(g)(2); the classroom copying guidelines for literary works and for musical works did not change Section 107. The formulation of guidelines for systematic in-house library photocopying would not change the meaning of Sections 108(d) or 108(g).

The library associations charge that AAP and the Authors League have "reneged" on a compromise agreement, made with them when the CONTU Guidelines were adopted, they claim that a condition for adopting the CONTU Guidelines was an understanding that no guidelines would be developed for other categories of library photocopying. This is not so. No such agreement was sought or made. The CONTU Guidelines apply only to the "interlibrary arrangements" proviso of Section 108(g)(2), which deals solely with interlibrary photocopying. They provide numerical criteria only for determining when a transaction involves systematic *interlibrary* photocopying of journal articles and other contributions not more than five years old. The preamble to the CONTU Guidelines says precisely that. The guidelines themselves say so. The House/Senate Conference Report says so. Nowhere on or off the record is there any statement to support the idea of a compromise agreement as alleged by the library associations, nor were there any verbal understandings. The congressional recommendation that comprehensive guidelines be developed by the parties is still in effect.

The library associations contend that the CONTU Guidelines call for a "five-year review" and that therefore it is somehow improper for AAP and the Authors League to urge the formulation of

guidelines for systematic *in-house* photocopying and for other categories of library photocopying until 1983. This, too, is not the case. The CONTU Guidelines on systematic interlibrary journal copying simply provide that "*these* guidelines shall be reviewed" within five years from the effective date of the Copyright Revision Bill [emphasis ours]. All that was agreed to, in plain English, is that the guidelines for interlibrary arrangements would be reviewed in five years. The purpose was simply to assure that the interlibrary guidelines were not frozen forever, but could be modified up or down in the light of experience.

Why Guidelines Must Be Formulated

The failure to provide practical guidance for library employees jeopardizes the balancing of author/publisher rights and library/patron needs established by Section 108.

In essence, the library associations are suggesting that, for the next five years, individual libraries should engage in in-house and other photocopying without providing any practical guidance to their employees in determining when given photocopying transactions do or do not require copyright permission. Perhaps they presume that, if there are no guidelines to assist in making the necessary determinations, all doubts will be resolved in favor of unauthorized copying and against the possibility that a given transaction may be illegal unless copyright permission is requested and payment made.

AAP and the Authors League believe that most libraries and librarians do not agree they should carry out library photocopying wearing blinders. Our experience has been that most librarians realize the need for explicit and practical guidance in making responsible decisions under Section 108, and they have indeed expressed this need at numerous seminars and workshops on the new law.

Obviously, the persisting absence of practical guidelines would also erode the rights of authors and publishers, for unauthorized photocopying would inevitably grow. Without such guidelines, publishers and authors of copyrighted materials would have to turn to the only other forum in which specific criteria can be established—the courts. That is not our desire.

Given the refusal of library associations to work with us, however, we set forth below unilateral Interim Guidelines for Section 108(d) photocopying. We hope you will find them helpful and reasonable. We would welcome your comments.

IV
The Interim Guidelines For Section 108(d) Material*

Without prejudice to our position in future negotiations or litigation, we suggest the following would be in compliance with the new law. (These guidelines do not apply to reserve desk or other copying for classroom teaching purposes; such copying is governed by the Classroom Teaching Guidelines (Appendix A at page 25)).

1. Copies requested by one library from other libraries

a. Journal articles five years old or less and contributions to other collective works. The CONTU Guidelines apply:

- *Journal articles.* Not more than five requests in the aggregate may be made in any calendar year for single copies of an article or articles published in any particular periodical (as distinguished from any given issue of the periodical) within five years of the date of the request.
- *Other Section 108(d) material (including poetry and fiction published in periodicals, anthologies, etc.).* Not more than five requests in the aggregate may be made in any calendar year for single copies of contributions to a periodical, anthology or other collective work—regardless of its age—so long as it is in copyright.

b. Journal articles more than five years old. Subject to the conditions stated in the CONTU Guidelines, not more than five requests may be made per year, in the aggregate for all of its users, for single copies of an article or articles published in a periodical (as distinguished from any given issue of the periodical) more than five years prior to the date of the request. Thus, a library may obtain from other libraries in any calendar year five copies in the aggregate of one or more articles published in that periodical during the previous five years and, *in addition*, five copies in the aggregate of one or more articles published in that periodical prior to that five-year period.

*Section 108(d) material includes an article or other contribution to a copyrighted collection or periodical issue, or a small part of any other copyrighted work.

2. **Copies made by a library for its own users from material in its own possession**
   - *Journal articles.* A library in any calendar year may make, in the aggregate for all of its users, not more than two copies of one article, or one copy each of two articles appearing in any given issue of a periodical. (Thus, a library could make up to 24 copies of articles within a year from a journal published monthly *subject to the two copies per issue limit.* We would be open to suggestions on a schedule of differing limits for journals of lesser frequency of publication.) However, a library may make in any event up to five copies from a given periodical (as distinguished from any given issue thereof) in a year (as under the CONTU Guidelines) to cover the possibility that all requests for copies in a given year are from only one or two issues.
   - *Other Section 108(d) material (including poetry and fiction published in periodicals, anthologies, etc.).* Up to five copies in the aggregate may be made in any calendar year of contributions in a given collective work.

V
Definitions of "Reasonable Effort" and "Fair Price"

Definitions for a "reasonable effort" to find a copy at a "fair price" (as required in Sections 108(c) and 108(e))

The Senate Committee Report describes a reasonable investigation as follows:

> "The scope and nature of a reasonable investigation to determine that an unused replacement cannot be obtained will vary according to the circumstances of a particular situation. It will always require recourse to commonly-known trade sources in the United States [i.e., wholesalers, jobbers, retail bookstores, etc.] and in the normal situation also to the publisher or other copyright owner (if such owner can be located at the address listed in the copyright registration), or an authorized reproducing service."

We believe a "fair price" for these purposes can reasonably be defined as the suggested list price if the work is available from the publisher or, if it is not so available, the prevailing retail price. Whether or not the work is available from commonly known trade sources or the publisher, if it is available from an authorized reproducing service the "fair price" for such a copy is the normal price charged by the reproducing service.

VI
Questions and Answers

Library Copying For its Own Users (Other Than For Teachers)

The isolated and unrelated making by a library for its users of single copies of the same material on separate occasions is permissible under Section 108. However, related or concerted reproduction or distribution of multiple copies of the same material is prohibited by Section 108(g)(1). Moreover, if the copying of Section 108(d) material is systematic—i.e. the purpose or the effect is to substitute the library photocopy for the purchase of the printed work, or a reprint or a copy from a licensed reproducing agency—the copying cannot be considered fair use under Section 107, and is specifically forbidden by Section 108(g)(2).

There are no guidelines as yet to establish workable criteria for identifying this kind of copying. For now, the AAP and the Authors League will be willing to accept the Interim Guidelines appearing on page 12 of this book.

The following questions and answers illustrate these principles:

1. **Q.** May a library that is eligible for Section 108 privileges supply single copies of an article from a periodical to an unlimited number of individuals?
   A. No. Section 108(d) permits the library to supply to a requesting user no more than one article from a given periodical issue. Section 108(g) limits this permission to *"the isolated and unrelated"* reproduction of a single copy of the same material on separate occasions. The section prohibits the "related or concerted" copying of the same material on one occasion or over a period of time; it also prohibits "systematic" copying, whether of multiple or single copies.

2. **Q.** May such a library supply a requesting user with a copy of each paper printed in a symposium issue?
   A. No. This would be neither fair use under Section 107, nor permitted under Section 108.

3. **Q.** Is a library that buys more than one subscription to a periodical entitled to use the number of its subscriptions as a multiplier of the number of copies it may make under the guidelines or guidances?

A. Yes. If, for example, a library has two subscriptions to a journal, it may make, in any calendar year, in the aggregate, not more than four copies of one article or two copies each of two articles appearing in an issue of that journal.

4. Q. Is it true that most library photocopying can be justified—is best justified—under the "fair use" doctrine of Section 107, and that Section 108 chiefly provides clarifications that were developed to allay unjustified library fears?

A. No. General reliance on the concept that Section 107 permits large-scale copying would place libraries in violation of the law. Section 108 gives library copying privileges not available under Section 107, and there is no refuge in Section 107 from the clear limits on these privileges set forth in Section 108.

5. Q. Is a library permitted to make additional photocopies of a journal article for a user under Section 107 ("fair use") after it has exhausted its right to do so under Section 108(d)?

A. Clearly not. The legislative reports stress that Section 108 authorizes certain *additional* photocopying practices that do not quality as "fair use" under Section 107. Thus, Section 108 amplifies and supplements Section 107. To attempt to argue the reverse is to stand the law on its head.

6. Q. Can it be considered a request by a user for "no more than one copy" (as the term is used in Section 108) if a library, in response to the user's subject request, supplies the user with a copy of each article on or related to that subject, that thereafter comes to its attention?

A. No, the supply of copies in such a manner would be neither "isolated" nor "unrelated"; hence, it would not be permissible under Section 108. On the contrary, it would be specifically prohibited as "systematic."

7. Q. If a library supplies a single photocopy of an article to an individual, at his request, in isolated and unrelated instances pursuant to the individual's own identification of articles through his own computer search, are such requests any different legally from other requests for photocopies he may make?

A. No; how the individual identifies references for himself would not seem to be germane.

8. Q. What if the computer search were conducted for the individual by the library, and were based on his request that the library send him a photocopy of each article identified by the search?

A. Clearly, this service would constitute "systematic" copying, prohibited by Section 108(g).

9. Q. Is it permissible to make a photocopy from a copy of an article if the first copy were legally prepared or obtained?

A. Permission or payment would usually be required for such additional copying.

10. Q. What if the copyright notice does not appear on the first generation copy?

A. A serious effort should then be made to identify the source of the article and seek the requisite permission.

11. Q. Are non-U. S. publishers covered under the new law?

A. Yes, in almost all instances.

12. Q. What restrictions, if any, are there on the copying of bibliographical references appearing as footnotes to or at the end of an article?

A. Each reference, as such, is in the public domain and is not subject to copyright. However, copyright may exist in the compilation of the references. Hence copying of compilations of such references will usually require permission.

13. Q. Can copies in excess of those permitted by the CONTU guidelines by obtained through interlibrary arrangements by the use of CCC* or a similar clearance mechanism? If so, how?

A. Yes. This can be done if either the requesting library or the supplying library reports the copying to CCC or a similar clearance mechanism. The Users Manual (available from CCC) indicates how the ILL form should be filled out to accomplish the purpose.

Copying on Equipment Located on the Library's Premises

A library will not be responsible for infringements committed by patrons on unsupervised reproducing equipment located on its premises, provided that the equipment displays a notice that the making of a copy may be subject to the copyright law.

The library will be responsible, however, for infringements committed by its own employees and, of course, for infringements committed by anyone using supervised equipment.

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*Copyright Clearance Center

Library Copying for "Intrasystem" Use

Copying carried on by branches or departments within the same "library system," i.e., by central library/headquarters and by branch libraries/departments must be aggregated to determine whether such copying exceeds permissible limits. This is true both for interlibrary arrangements and for copying done within the library system for its own users.

Library Copying For Teachers

The Guidelines for Classroom Copying in Not-For-Profit Educational Institutions With Respect to Books and Periodicals (Appendix B) permit the making of a single copy for the teacher's use in teaching or preparing to teach a class. The copying may be of a chapter from a book, an article from a periodical, a short story, short essay or short poem, or a chart, diagram or drawing from a book or periodical.

The Classroom Guidelines also permit the making of multiple copies for classroom use, not to exceed one copy per pupil in the course, provided that the copying meets the tests of brevity, spontaneity, and cumulative effect, each as defined in the Guidelines and provided, further, that each copy includes a notice of copyright.

The Classroom Guidelines establish standards for copying, either by or for the teacher. Librarians may therefore make copies for the teacher, to the same extent and subject to the same limitations that teachers themselves may make copies.

The following questions and answers illustrate these principles:

14. Q. May a library make a copy or copies for the teacher that the Classroom Guidelines permit the teacher to make?

A. Yes, but, to protect itself, the library should determine that the copying is permitted by the Classroom Guidelines. If the copying is not permitted, both the librarian and the teacher may be liable for infringement.

15. Q. May copies be made by or for instructional specialists on the school staff, i.e., reading specialists, curriculum specialists, or audiovisual directors, guidance counselors and the like, in the same manner as they could be made by or for teachers?

A. Yes. The term "teacher" includes instructional specialists working in consultation with actual instructors.

16. Q. Must the copy or copies made by the librarian for the teacher include a notice of copyright?

A. Yes. The Classroom Guidelines, which state the minimum standards of fair use under Section 107, require the inclusion of the notice, and Section 108, which gives limited additional copying rights to libraries, likewise requires it.

17. Q. Will it be sufficient to state that the material copied "may" be in copyright?

A. No. This will not be in compliance with the Classroom Guidelines or with Section 108(a)(3).

18. Q. May the library make multiple copies of material for the teacher for classroom use or discussion?

A. Yes, provided that the copying meets the tests of brevity, spontaneity, and cumulative effect, each as stated in the Classroom Guidelines and provided, further, that each copy includes a notice of copyright.

19. Q. May a library comply with a teacher's request to supply copies of a 3,500-word short story for classroom use?

A. No. The requested material would not meet the test of brevity, which limits the copying to a story of less than 2,500 words or an excerpt of not more than 1,000 words or 10 per cent of the work, whichever is less.

20. Q. May the library comply with a teacher's request to supply 60 copies of a short poem (of less than 250 words) if he or she is teaching a class of thirty pupils and desires that each pupil use one copy in the classroom and have a second copy available for reference at the pupil's home?

A. No. Multiple copies may be made in an amount not to exceed, in any event, more than one copy per pupil in a course.

21. Q. May a library comply with the school superintendent's request to supply thirty copies of a short poem (less than 250 words) to a teacher for use in teaching his or her course?

A. No. The requested copying would not meet the test of spontaneity, which requires that the copying be at the instance and inspiration of the individual teacher.

22. Q. May the library comply with a teacher's request to supply otherwise guideline-permitted copies if the copies are intended for use substantially later in the course?

A. No. The copying would not meet the test of spontaneity, which requires that the inspiration and decision to use the work and the moment of its use are so close in time that it would be unreasonable to expect a timely reply to a request to the copyright owner for permission to make the copies.

23. Q. Is the photocopying of books, periodicals, and other materials for placement on course reserve in academic libraries permitted under the Guidelines for Classroom Copying?

A. Only if the copying complies with the limitations of the Classroom Guidelines, including the tests of brevity, spontaneity and cumulative effect, and only if the copies are not returned to the library for re-use.

24. Q. A teacher brings a book from a personal collection or other outside source to the library and asks the library to make copies on request from students. Is this permissible photocopying?

A. Only if the copying is permitted by the Classroom Guidelines or by Section 108.

25. Q. Who is liable if a teacher checks out a book from the library, unlawfully makes photocopies, and asks the library to place the photocopies on reserve?

A. The teacher will be liable for unlawful copying; the library will be liable for unlawful distribution.

26. Q. May librarians make or distribute copies of an article for the reserve collection without copyright permission?

A. No, unless specifically authorized by the Classroom Guidelines. The copying would not be permissible under Section 108(d), which authorizes single copying only at the request of the "user"—i.e., the student and not the teacher—and it would be prohibited by Section 108(g)(1), which prohibits multiple copying.

Library Copying For Interlibrary Arrangements

The CONTU Guidelines for interlibrary arrangements (Appendix A) apply only to the ordering by one library from another of:

- copies of articles published in a journal or other periodical within five years from the date of the request for the copy, and
- copies of other material (including fiction and poetry) published in other kinds of collective works such as anthologies, regardless of the date of publication, so long as the work is still in copyright.

The CONTU Guidelines do not apply to interlibrary requests for other kinds of material described in Section 108(d), i.e., articles published in a journal more than five years before the date of the request, or copies of more than "a small part" of any other copyrighted work. Nor do they apply to the supply of copies of any kind of material by institutions, public or private, that exist for the specific purpose of providing a central source for photocopies.

The CONTU Guidelines state that no request for any material to which the Guidelines apply may be fulfilled by the supplying library unless the request is accompanied by a representation that "the request was made in conformity with these guidelines." Consequently, if the requesting library relies on the CONTU Guidelines to justify its request, it must specifically so indicate. A statement that reliance is placed on "other provisions" of the copyright law will not meet the CONTU Guideline requirement.

The following questions and answers will illustrate how the CONTU Guidelines are to be applied.

27. Q. Please give examples of how many copies of an article or articles published in a given periodical, during the five-year period prior to the date of the request, may be requested in any calendar year.

A. In any calendar year, the requesting library may make a total of not more than five requests for an article or articles from the same periodical. Thus, it may request in that year one copy of each of five different articles published in PHYSICS TODAY during the past five years, or five copies of one of such articles, or three of one and two of another, so long as the *total* number of copies of articles from this periodical, published during the prior five-year period, does not exceed five.

28. Q. Please give examples of how many copies of other material published in other kinds of collective works may be requested in any calendar year.

A. In any calendar year, the requesting library may make a total of not more than five requests for single copies of a contribution or contributions published in the same collective work. Thus, the library may request in that year one copy of each of five poems or short stories appearing in the same anthology,

or five copies of one of the short stories, or three copies of one of the short stories and two of the poems appearing in that anthology, so long as the total number of requests from that anthology does not exceed five. This is true regardless of the date of publication of the anthology so long as it still remains in copyright.

29. Q. Does the rule as stated in number 28 above also apply to requests for "a small part" or small parts of a single work as distinguished from an anthology or other kind of collective work?

A. Yes, it does. A "small part" as used in Section 108(d), and as referred to in Section 108(g)(2), is not defined. Presumably, however, short parts are the equivalent of the "short passages" that are given as an example of fair use in the Report of the Register of Copyrights, and repeated in the Senate and House Reports. (see page 3).

30. Q. What rules apply if, in a calendar year, a library requests four copies of articles from the same periodical published during the past five years, and five copies of one or more articles published in the same periodical eight years prior to the request?

A. The CONTU Guidelines permit the supply of the articles published during the past five years, and the Interim Guidelines proposed by AAP and the Authors League permit the supply, in addition, of up to five copies published prior thereto. Of course, if the older articles are no longer in copyright, copies may be supplied without limitation.

31. Q. Does the CONTU Guideline "rule of five" vary if the library requests are made to more than one supplying library?

A. No, the rule is the same regardless of whether the requesting library addresses its requests to one or to many libraries. The emphasis of the rule is on the *requesting* library – not the library or the libraries to which requests are forwarded.

32. Q. What assurances must the requesting library give to the supplying library if the request is made in reliance on the CONTU Guidelines?

A. The requesting library should advise the supplying library that the requested copying is permitted by the CONTU Guidelines. The supplying library, in turn, will not be able to justify the requested copying as copying permitted by the CONTU Guidelines unless the requesting library makes the specific representation that it is so justified.

33. Q. May the CONTU Guidelines be relied on if the request is accompanied by a representation that it is *either* made in conformity with the guidelines *or* is otherwise permitted under Section 107 or 108 of the copyright law?

A. No, the request will not comply with paragraph 3 of the CONTU Guidelines.

34. Q. May the CONTU Guidelines be relied on if the request states that the requested copying is authorized by Section 107 or 108?

A. No, the request will not comply with paragraph 3 of the CONTU Guidelines, and the burden will be on the supplying library to justify the copying.

35. Q. Which library—the requesting or the supplying library—is liable for copyright infringement if the copying is not permitted under the CONTU Guidelines?

A. Both the requesting and the supplying library will be liable.

36. Q. What records, if any, must be kept by the library?

A. Paragraph 4 of the CONTU Guidelines requires the *requesting library* to maintain records of all requests made by it, and of the fulfillment of such requests, and to retain them for three calendar years after the end of the calendar year in which the request was made.

37. Q. Must the supplied copy contain a notice of copyright?

A. Yes, the notice of copyright is required; otherwise, the copying exemption will not apply. The required notice should be the statutory notice stating the word "copyright" or © or the abbreviation "Copr.", the name of the owner of copyright, and the date of copyright. To avoid error, the librarian should include in the copy the notice of copyright appearing on the copied work. This is only reasonable. It will let the user know whether the work is in copyright, it will advise him of the identity of the copyright owner, and it will put him in a position to request permission to make further copies if he so desires.

We disagree with the expressed view of the Council of National Library Associations that the following notice is adequate: "This material may be protected by copyright law (Title 17 U.S. Code)." *We believe such a notice is totally inadequate to comply with the requirements of Section 108(a)(3).*

38. Q. May a library lawfully obtain photocopies from service organizations such as the British Library Lending Division?

A. Only if the supplying service is licensed to provide the copies, or if it *or* the requesting library reports and pays for the photocopies through the Copyright Clearance Center or other recognized clearance or royalty payment mechanism.

39. Q. How can copies in excess of those permitted by the CONTU Guidelines be obtained?

A. Either the requesting or the supplying library can request permission from the copyright owner to make the requested copies, or it can purchase the copies from the publisher or its licensed reproducing agency, or the copying can be done by paying the required copying fee to the Copyright Clearance Center or other similar clearing mechanism—provided, of course, that the work is registered in the CCC or other clearance system.

If the requesting library has already exceeded the CONTU Guideline limit, the ILL request should state either that the requesting library will pay the copying fee to CCC or to a similar clearing organization or should request the supplying library to make the required payment for the copying transaction.

40. Q. Who is responsible for payment of the copying fee when a copy of an article is supplied by facsimile transmission?

A. As in the case of the supply of a copy through conventional interlibrary arrangements, the library that does the copying has the responsibility for seeing that the fee, if required, is paid. However, as between the requesting and the supplying library, the cost will be borne as agreed between them.

APPENDIXES

APPENDIX A

(The following material is reprinted from the House Committee Report of September 3, 1976.)

AGREEMENT ON GUIDELINES FOR CLASSROOM COPYING IN NOT-FOR-PROFIT EDUCATIONAL INSTITUTIONS WITH RESPECT TO BOOKS AND PERIODICALS

The purpose of the following guidelines is to state the minimum and not the maximum standards of educational fair use under Section 107 of H.R. 2223. The parties agree that the conditions determining the extent of permissible copying for educational purposes may change in the future; that certain types of copying permitted under these guidelines may not be permissible in the future; and conversely that in the future other types of copying not permitted under these guidelines may be permissible under revised guidelines.

Moreover, the following statement of guidelines is not intended to limit the types of copying permitted under the standards of fair use under judicial decision and which are stated in Section 107 of the Copyright Revision Bill. There may be instances in which copying which does not fall within the guidelines stated below may nonetheless be permitted under the criteria of fair use.

GUIDELINES

I. SINGLE COPYING FOR TEACHERS:

A single copy may be made of any of the following by or for a teacher at his or her individual request for his or her scholarly research or use in teaching or preparation to teach a class:

A. A chapter from a book;
B. An article from a periodical or newspaper;
C. A short story, short essay or short poem, whether or not from a collective work;
D. A chart, graph, diagram, drawing, cartoon or picture from a book, periodical, or newspaper;

II. MULTIPLE COPIES FOR CLASSROOM USE:

Multiple copies (not to exceed in any event more than one copy per pupil in a course) may be made by or for the teacher giving the course for classroom use or discussion; *provided that:*

A. The copying meets the tests of brevity and spontaneity as defined below; *and,*
B. Meets the cumulative effect test as defined below; *and,*
C. Each copy includes a notice of copyright.

DEFINITIONS:

Brevity:

i. Poetry: (a) A complete poem if less than 250 words and if printed on not more than two pages or (b) from a longer poem, an excerpt of not more than 250 words.

ii. Prose: (a) Either a complete article, story or essay of less than 2,500 words, or (b) an excerpt from any prose work of not more than 1,000 words or 10% of the work, whichever is less, but in any event a minimum of 500 words.

[*Each of the numerical limits stated in "i" and "ii" above may be expanded to permit the completion of an unfinished line of a poem or of an unfinished prose paragraph.*]

iii. Illustration: One chart, graph, diagram, drawing, cartoon or picture per book or per periodical issue.

iv. "Special" works: Certain works in poetry, prose or in "poetic prose" which often combine language with illustrations and which are intended sometimes for children and at other times for a more general audience fall short of 2,500 words in their entirety. Paragraph "ii" above notwithstanding such "special works" may not be reproduced in their entirety; however, an excerpt comprising not more than two of the published pages of such special work and containing not more than 10% of the words found in the text thereof, may be reproduced.

Sponataneity:

i. The copying is at the instance and inspiration of the individual teacher, and

ii. The inspiration and decision to use the work and the moment of its use for maximum teaching effectiveness are so close in time that it would be unreasonable to expect a timely reply to a request for permission.

Cumulative Effect:

i. The copying of the material is for only one course in the school in which the copies are made.

ii. Not more than one short poem, article, story, essay or two excerpts may be copied from the same author, nor more than three from the same collective work or periodical volume during one class term.

iii. There shall not be more than nine instances of such multiple copying for one course during one class term.

[*The limitations stated in "ii" and "iii" above shall not apply to current news periodicals and newspapers and current news sections of other periodicals.*]

III. PROHIBITIONS AS TO I AND II ABOVE:

Notwithstanding any of the above, the following shall be prohibited:

A. Copying shall not be used to create or to replace or substitute for anthologies, compilations or collective works. Such replacement or substitution may occur whether copies of various works or excerpts therefrom are accumulated or are reproduced and used separately.

B. There shall be no copying of or from works intended to be "consumable" in the course of study or of teaching. These include workbooks, exercises, standardized tests and test booklets and answer sheets and like consumable material.

C. Copying shall not:
   a. substitute for the purchase of books, publisher's reprints or periodicals;
   b. be directed by higher authority;
   c. be repeated with respect to the same item by the same teacher from term to term.

D. No charge shall be made to the student beyond the actual cost of the photocopying.

AGREED

March 19, 1976

AD HOC COMMITTEE ON COPYRIGHT LAW REVISION
By Sheldon Elliott Steinbach

AUTHOR-PUBLISHER GROUP
AUTHORS LEAGUE OF AMERICA
By Irwin Karp, Counsel

ASSOCIATION OF AMERICAN PUBLISHERS, INC.
By Alexander C. Hoffman, Chairman
Copyright Committee

In commenting on these guidelines the House Committee noted that the American Association of University Professors and the Association of American Law Schools criticized them as being too restrictive. However, the conclusion finally reached is clearly stated:

> "The Committee believes the guidelines are a reasonable interpretation of the minimum standards of fair use. Teachers will know that copying within the guidelines is fair use. Thus, the guidelines serve the purpose of fulfilling the need for greater certainty and protection for teachers." (from page 72 House Rep. No. 94-1476)

GUIDELINES FOR INTERLIBRARY ARRANGEMENTS

(The following is reprinted from the Conference Report of September 29, 1976.)

Introduction

Subsection 108(g)(2) of the bill deals, among other things, with limits on interlibrary arrangements for photocopying. It prohibits systematic photocopying of copyrighted materials but permits interlibrary arrangements "that do not have, as their purpose or effect, that the library or archives receiving such copies or phono-records for distribution does so in such aggregate quantities as to substitute for a subscription to or purchase of such work."

The National Commission on New Technological Uses of Copyrighted Works offered its good offices to the House and Senate subcommittees in bringing the interested parties together to see if agreement could be reached on what a realistic definition would be of "such aggregate quantities." The Commission consulted with the parties and suggested the interpretation which follows, on which there has been substantial agreement by the principal library, publisher, and author organizations. The Commission considers the guidelines which follow to be a workable and fair interpretation of the intent of the proviso portion of subsection 108(g)(2).

These guidelines are intended to provide guidance in the application of Section 108 to the most frequently encountered interlibrary case: a library's obtaining from another library, in lieu of interlibrary loan, copies of articles from relatively recent issues of periodicals – those published within 5 years prior to the date of the request. The guidelines do not specify what aggregate quantity of copies of an article or articles published in a periodical, the issue date of which is more than 5 years prior to the date when the request for the copy thereof is made, constitutes a substitute for a subscription to such periodical. The meaning of the proviso to subsection 108(g)(2) in such case is left to future interpretation.

The point has been made that the present practice on interlibrary loans and use of photocopies in lieu of loans may be supplemented or even largely replaced by a system in which one or more agencies or institutions, public or private, exist for the specific purpose of providing a central source for photocopies. Of course, these guidelines would not apply to such a situation.

Guidelines for the Proviso of Subsection 108(g)(2)

1. As used in the proviso of subsection 108(g)(2), the words ". . . such aggregate quantities as to substitute for a subscription to or purchase of such work" shall mean:

(a) with respect to any given periodical (as opposed to any given issue of a periodical) filled requests of a library or archives (a "requesting entity") within any calendar year for a total of six or more copies of an article or articles published in such periodical within 5 years prior to the date of the request. These guidelines specifically shall not

apply, directly or indirectly, to any request of a requesting entity for a copy or copies of an article or articles published in any issue of a periodical, the publication date of which is more than 5 years prior to the date when the request is made. These guidelines do not define the meaning, with respect to such a request, of "... such aggregate quantities as to substitute for a subscription to [such periodical]."

(b) with respect to any other material described in subsection 108(d) (including fiction and poetry), filled requests of a requesting entity within any calendar year for a total of six or more copies or phonorecords of or from any given work (including a collective work) during the entire period when such material shall be protected by copyright.

2. In the event that a requesting entity–

(a) shall have in force or shall have entered an order for a subscription to a periodical, or

(b) has within its collection, or shall have entered an order for, a copy or phonorecord of any other copyrighted work, material from either category of which it desires to obtain by copy from another library or archives (the "supplying entity"), because the material to be copied is not reasonably available for use by the requesting entity itself, then the fullfillment of such request shall be treated as though the requesting entity made such copy from its own collection. A library or archives may request a copy or phonorecord from a supplying entity only under those circumstances where the requesting entity would have been able, under the provisions of Section 108, to supply such copy from materials in its own collection.

3. No request for a copy or phonorecord of any material to which these guidelines apply may be fulfilled by the supplying entity unless such request is accompanied by a representation by the requesting entity that the request was made in conformity with these guidelines.

4. The requesting entity shall maintain records of all requests made by it for copies or phonorecords of any materials to which these guidelines apply and shall maintain records of the fulfillment of such requests, which records shall be retained until the end of the third complete calendar year after the end of the calendar year in which the respective request shall have been made.

5. As part of the review provided for in subsection 108(i), these guidelines shall be reviewed not later than 5 years from the effective date of this bill.

APPENDIX B

(The following is reprinted from the Senate Committee Report No. 94-473)

Multiple copies and systematic reproduction

Subsection (g) provides that the rights granted by this section extend only to the "isolated and unrelated reproduction of a single copy," but this section does not authorize the related or concerted reproduction of multiple copies of the same material whether made on one occasion or over a period of time, and whether intended for aggregate use by one individual or for separate use by the individual members of a group. For example, if a college professor instructs his class to read an article from a copyrighted journal, the school library would not be permitted, under subsection (g), to reproduce copies of the article for the members of the class.

Subsection (g) also provides that section 108 does not authorize the systematic reproduction or distribution of copies or phonorecords of articles or other contributions to copyrighted collections or periodicals or of small parts of other copyrighted works whether or not multiple copies are reproduced or distributed. Systematic reproduction or distribution occurs when a library makes copies of such materials available to other libraries or to groups of users under formal or informal arrangements whose purpose or effect is to have the reproducing library serve as their source of such material. Such systematic reproduction and distribution, as distinguished from isolated and unrelated reproduction or distribution, may substitute the copies reproduced by the source library for subscriptions or reprints or other copies which the receiving libraries or users might otherwise have purchased for themselves, from the publisher or the licensed reproducing agencies.

While it is not possible to formulate specific definitions of "systematic copying," the following examples serve to illustrate some of the copying prohibited by subsection (g).

(1) A library with a collection of journals in biology informs other libraries with similar collections that it will maintain and build its own collection and will make copies of articles from these journals available to them and their patrons on request. Accordingly, the other libraries discontinue or refrain from purchasing subscriptions to these journals and fulfill their patrons' requests for articles by obtaining photocopies from the source library.

(2) A research center employing a number of scientists and technicians subscribes to one or two copies of needed periodicals. By reproducing photocopies of articles the center is able to make the material in these periodicals available to its staff in the same manner which otherwise would have required multiple subscriptions.

(3) Several branches of a library system agree that one branch will subscribe to particular journals in lieu of each branch purchasing its own subscriptions, and the one subscribing branch will reproduce copies of articles from the publication for users of the other branches.

The committee believes that section 108 provides an appropriate statutory balancing of the rights of creators, and the needs of users. However, neither a statute nor legislative history can specify precisely which library photocopying practices constitute the making of "single copies" as dis-

tinguished from "systematic reproduction." Isolated single spontaneous requests must be distinguished from "systematic reproduction." The photocopying needs of such operations as multicounty regional systems must be met. The committee therefore recommends that representatives of authors, book and periodical publishers and other owners of copyrighted material meet with the library community to formulate photocopying guidelines to assist library patrons and employees. Concerning library photocopying practices not authorized by this legislation, the committee recommends that workable clearance and licensing procedures be developed.

Commenting on library association contentions that the Senate Committee Report had been superceded by the House and Conference Committee Reports, Senator John McClellan, Chairman of the Senate Judiciary Subcommittee, wrote Townsend Hoopes, President of the AAP, in January 1977 as follows:

AAP/Authors League

United States Senate
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON PATENTS, TRADE-MARKS, AND COPYRIGHTS
(PURSUANT TO SEC. 13, S. RES. 24, 93D CONGRESS)
WASHINGTON, D.C. 20510

January 12, 1977

Mr. Townsend Hoopes, President
Association of American Publishers, Inc.
1707 L Street, N. W. Suite 480
Washington, D. C. 20036

Dear Mr. Hoopes:

I have your letter of December 22nd concerning the legislative history of Public Law 94-553, which originated as my bill, S. 22. You state that certain suggestions have been made that the legislative history of the bill consists only of the House Committee Report and the Conference Report. I am not acquainted with the statements to which you make reference, but if they have been made they are clearly erroneous.

The legislative history consists of the Committee Reports, of both the Senate and the House, the Conference Report and the Floor debates. Unless the Conference Report modified language in the Senate Bill or Report, the most authoritative expression of the intent of S. 22 would be the Report of the Senate Committee on the Judiciary. There are several sections of S. 22 where major changes were made by the House of Representatives and accepted in the Conference Committee. This, however, is not the situation with respect to the library photocopying provisions. Section 108 was principally developed in the Senate, and all the language of the Senate Bill was retained by the House of Representatives. The amendment made by the House to Section 108 (g)(2) and accepted by the Senate managers of the bill incorporates in the statute the legislative intent of the Senate Report relating to "systematic reproduction or distribution."

I have examined the Report of the House Committee on S. 22 and there is nothing contained in that document which in any way purports to modify the intent of the Senate language. Furthermore, it is significant that the Conference Report does not contain any language modifying the language of the Senate Report on "systematic reproduction", although on other subjects the Conference Report does directly modify language in either the Senate or House Reports.

I trust this information is responsive to your inquiry, and with kind personal regards, I am

Sincerely,

John L. McClellan

John L. McClellan
Chairman

APPENDIX C

(This is reprinted from Pub. L. 94-553)

§ 107. Limitations on exclusive rights: Fair use

Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

§ 108. Limitations on exclusive rights: Reproduction by libraries and archives

(a) Notwithstanding the provisions of section 106, it is not an infringement of copyright for a library or archives, or any of its employees acting within the scope of their employment, to reproduce no more than one copy or phonorecord of a work, or to distribute such copy or phonorecord, under the conditions specified by this section, if—

(1) the reproduction or distribution is made without any purpose of direct or indirect commercial advantage;

(2) the collections of the library or archives are (i) open to the public, or (ii) available not only to researchers affiliated with the library or archives or with the institution of which it is a part, but also to other persons doing research in a specialized field; and

(3) the reproduction or distribution of the work includes a notice of copyright.

(b) The rights of reproduction and distribution under this section apply to a copy or phonorecord of an unpublished work duplicated in facsimile form solely for purposes of preservation and security or for deposit for research use in another library or archives of the type described by clause (2) of subsection (a), if the copy or phonorecord reproduced is currently in the collections of the library or archives.

(c) The right of reproduction under this section applies to a copy or phonorecord of a published work duplicated in facsimile form solely for the purpose of replacement of a copy or phonorecord that is damaged, deteriorating, lost, or stolen, if the library or archives has, after a reasonable effort, determined that an unused replacement cannot be obtained at a fair price.

(d) The rights of reproduction and distribution under this section apply to a copy, made from the collection of a library or archives where the user makes his or her request or from that of another library or archives, of no more than one article or other contribution to a copyrighted collection or periodical issue, or to a copy or phonorecord of a small part of any other copyrighted work, if—

(1) the copy or phonorecord becomes the property of the user, and the library or archives has had no notice that the copy or phonorecord would be used for any purpose other than private study, scholarship, or research; and

(2) the library or archives displays prominently, at the place where orders are accepted, and includes on its order form, a warning of copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation.

(e) The rights of reproduction and distribution under this section apply to the entire work, or to a substantial part of it, made from the collection of a library or archives where the user makes his or her request or from that of another library or archives, if the library or archives has first determined, on the basis of a reasonable investigation, that a copy or phonorecord of the copyrighted work cannot be obtained at a fair price, if—

(1) the copy or phonorecord becomes the property of the user, and the library or archives has had no notice that the copy or phonorecord would be used for any purpose other than private study, scholarship, or research; and

(2) the library or archives displays prominently, at the place where orders are accepted, and includes on its order form, a warning of copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation.

(f) Nothing in this section—

(1) shall be construed to impose liability for copyright infringement upon a library or archives or its employees for the unsupervised use of reproducing equipment located on its premises: *Provided*, That such equipment displays a notice that the making of a copy may be subject to the copyright law;

(2) excuses a person who uses such reproducing equipment or who requests a copy or phonorecord under subsection (d) from liability for copyright infringement for any such act, or for any later use of such copy or phonorecord, if it exceeds fair use as provided by section 107;

(3) shall be construed to limit the reproduction and distribution by lending of a limited number of copies and excerpts by a library or archives of an audiovisual news program, subject to clauses (1), (2), and (3) of subsection (a); or

(4) in any way affects the right of fair use as provided by section 107, or any contractual obligations assumed at any time by the library or archives when it obtained a copy or phonorecord of a work in its collections.

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(g) The rights of reproduction and distribution under this section extend to the isolated and unrelated reproduction or distribution of a single copy or phonorecord of the same material on separate occasions, but do not extend to cases where the library or archives, or its employee—

(1) is aware or has substantial reason to believe that it is engaging in the related or concerted reproduction or distribution of multiple copies or phonorecords of the same material, whether made on one occasion or over a period of time, and whether intended for aggregate use by one or more individuals or for separate use by the individual members of a group; or

(2) engages in the systematic reproduction or distribution of single or multiple copies or phonorecords of material described in subsection (d) : *Provided*, That nothing in this clause prevents a library or archives from participating in interlibrary arrangements that do not have, as their purpose or effect, that the library or archives receiving such copies or phonorecords for distribution does so in such aggregate quantities as to substitute for a subscription to or purchase of such work.

(h) The rights of reproduction and distribution under this section do not apply to a musical work, a pictorial, graphic or sculptural work, or a motion picture or other audiovisual work other than an audiovisual work dealing with news, except that no such limitation shall apply with respect to rights granted by subsections (b) and(c), or with respect to pictorial or graphic works published as illustrations, diagrams, or similar adjuncts to works of which copies are reproduced or distributed in accordance with subsections (d) and (e).

(i) Five years from the effective date of this Act, and at five-year intervals thereafter, the Register of Copyrights, after consulting with representatives of authors, book and periodical publishers, and other owners of copyrighted materials, and with representatives of library users and librarians, shall submit to the Congress a report setting forth the extent to which this section has achieved the intended statutory balancing of the rights of creators, and the needs of users. The report should also describe any problems that may have arisen, and present legislative or other recommendations, if warranted.

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APPENDIX D

SOME OF THE MEANS AVAILABLE TO OBTAIN PHOTOCOPYING LICENSES OR AUTHORIZED COPIES OF COPYRIGHTED MATERIAL

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INDIVIDUAL LICENSES

Some publishers are prepared to negotiate individual licenses with users who have a continuing need to make copies.

APPENDIX E

(This is excerpted from "Explaining the New Copyright Law," published by AAP.)

How To Obtain Permissions

For uses which go beyond "fair use," permission must be granted by the copyright owner.

Under U.S. copyright law, there is a requirement for the copyright notice, which consists of the year of publication, the name of the copyright owner and, in general, any acknowledgments of other copyrighted material used in the book. In this context, the word "acknowledgment" indicates that some materials were originally published elsewhere, and that the copyright for these materials remains with the original owner. It is wise to check . . . when requesting permission to duplicate, since the material in question may be the property of an author or publisher other than that of the material you are using. The page with the copyright notice is also useful in determining the actual copyright holder (particularly in the case of paperback editions, reprints, etc.) because the material is, unless marked "original edition," probably still the property of the first edition publisher. In the case of audiovisual materials, this notice is printed on the label. Some materials, graphs, charts, or photographs may not be the property of the immediate publisher or author, and thus permission to duplicate cannot be granted by that publishing house.

After checking to determine who owns the copyright on the material, the next step is to request permission to duplicate. One of the most frequent reasons cited by permissions departments for delays in answering requests of this nature is incomplete or inaccurate information contained in requests. A survey of permissions professionals conducted by the AAP determined that the following facts are necessary in order to authorize duplication of copyrighted materials.

1. Title, author and/or editor, and edition of materials to be duplicated
2. Exact material to be used, giving amount, page numbers, chapters and, if possible, a photocopy of the material
3. Number of copies to be made
4. Use to be made of duplicated materials
5. Form of distribution (classroom, newsletter, etc.)
6. Whether or not the material is to be sold
7. Type of reprint (ditto, photocopy, offset, typeset).

The request should be sent, together with a self-addressed return envelope, to the permissions department of the publisher in question. If the address of the publisher does not appear at the front of the material, it may be readily obtained in publications entitled THE LITERARY MARKETPLACE (for books) or ULRICH'S INTERNATIONAL PERIODICALS (for journals) published by the R. R. Bowker Company and available in all libraries.

Because each request must be checked closely by the publisher, it is advisable to allow enough lead time to obtain the permission before the materials are needed. Granting of a permission to duplicate is not simply a "yes" or "no" matter. (Although many publishers have a minimum or no-charge policy for such uses by noncommercial organizations, they must first review the status of the copyright to see if the power to grant duplication rights of this nature is within their scope or province.) Each such request requires a careful checking of the status of the copyright, determination of exact materials to be duplicated (which sometimes involves ordering a copy of the material from a warehouse), and assignment of author's royalties if fees are involved. Some helpful hints from those involved daily in the processing of permission include:

1. Request all permissions for a specific project at the same time
2. Don't ask for a blanket permission—it cannot, in most cases, be granted
3. Send a photocopy of the copyright page and the page or pages on which permission is requested
4. Make sure to include a return address in your request.

Sample Request for Permission

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February 6, 1975

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